SUPREME COURT, U.S.

MAR 13 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1142

JAMES HENRY SMITH,
Petitioner

vs.

STATE OF NORTH CAROLINA,
Respondent

Petition for a Writ of Certiorari
To the Supreme Court of North Carolina

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STATE OF NORTH CAROLINA,
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Petition for a Writ of Certiorari
To the Supreme Court of North Carolina

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina, dated and entered in the above cause of 14 December, 1966, in which no error was found in the trial of the petitioner in the Superior Court of North Carolina for the Twelfth Judicial District, wherein your petitioner was found guilty of second degree murder and received an active prison sentence of twelve to fifteen years.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina, which is printed in the Appendix hereto, is reported in 286 N. C. 659, 151 S. E. 2d 596.

JURISDICTION

The judgment of the North Carolina Supreme Court sought to be reviewed was dated and entered on 14 December, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

QUESTIONS PRESENTED

1. Is the failure to swear prospective jurors in a felony case to answer questions touching on their competency as jurors, and in failing to swear the jurors after they have been selected and impaneled to try the cause, a denial of due process within the meaning of the Fourteenth Amendment?

2. Does the failure of a defendant in a felony case to be present at the swearing of a jury to try his cause constitute a violation of due process within the meaning of the Fourteenth Amendment?

STATUTES INVOLVED

The Constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On Monday, April 25, 1966, at 10:00 A. M. in the Court House in the City of Raeford, North Carolina, Hoke County Superior Court was opened for trial of criminal cases, his Honor, Leo Carr, presiding and holding said Court according to law. All persons summoned to attend said term as jurors were asked to stand, and Bibles were distributed to them, and each juror summoned for the term placed his or her left hand on the Holy Bible, and raised his or her hand upward, whereupon the Clerk of the Hoke County Superior Court then administered the following oath: "You and each of you swear that you will well and truly try all issues in criminal actions which shall come before you during this term and true verdicts give according to the evidence thereon; so help you, God." It is not known whether your petitioner was physically present in the court room at the time the aforementioned oath was administered. The attorneys for your petitioner were not present. Thereupon the Solicitor duly began to call the docket of cases set for trial at the April 25, 1966 Criminal Term of Hoke County Superior Court. (R p 5).

Your petitioner was charged with first degree murder. On the call of the case, the Solicitor announced that the State would not seek a higher verdict than murder in the second degree or manslaughter as the facts might warrant.

After the jury had been selected, the Clerk made the following statement: "Members of the jury, you have been sworn and are now impaneled to try this action wherein the State of North Carolina is the plaintiff and James Henry Smith is the defendant; sit together, hear the evidence, and render your verdict accordingly." The jurors were not sworn to answer questions touching their competency to serve as jurors, nor were the jurors sworn to try the case after they had been selected and impaneled, no Bibles being

distributed to the jurors at either time and no oath being administered (R p 6).

Your petitioner was tried and the jury subsequently returned a verdict of "guilty of murder in the second degree." Your petitioner moved the Court that there be a new trial for errors committed in the course of the trial. This motion was denied and your petitioner excepted. Your petitioner then moved for an arrest of judgment. This motion was denied and your petitioner excepted. (R p 129).

It was not specifically pointed out to the trial court that your petitioner contended that the jurors had not been properly sworn inasmuch as your petitioner and his counsel were not aware of this at that time.

The trial court then entered judgment as follows:

> "It is the judgment of the Court that the defendant be confined in the State's Prison not less than twelve nor more than fifteen years." (R p 130).

Your petitioner then took exception to the judgment and gave notice of appeal to the Supreme Court of North Carolina. Upon appeal to the Supreme Court of North Carolina, your petitioner made assignments of error including the following:

ASSIGNMENT OF ERROR #1

> The defendant-appellant assigns as error the failure of the Court to swear the jurors to answer questions touching on their competency as jurors and the failure of the Court to swear the jurors to try the cause after they had been selected and impaneled to try the cause (R p 131).

ASSIGNMENT OF ERROR #15

> The defendant-appellant assigns as error the ac-

tion of the Court in denying defendant's motion in arrest of judgment. (R p 136).

ASSIGNMENT OF ERROR #16

The defendant-appellant assigns as error the action of the Court in entering judgment. (R p 136).

The Supreme Court of North Carolina found no error in the trial.

REASON FOR GRANTING CERTIORARI

There appears to be no doubt that a jury must be sworn in a criminal case; otherwise the trial results in a nullity. This was true at common law, and is apparently the law today in the federal courts and all the state courts, including that of North Carolina. It is contended that the practice of swearing juries is so deeply entrenched in American jurisprudence that the failure to swear a jury in a criminal matter, particularly a felony case, would be a denial of due process within the meaning of the Fourteenth Amendment.

While it is true that the Constitution of the United States does not guarantee to its citizens a trial by jury in state courts, when a state provides for a jury trial it should not be excused for violating a citizen's rights under the Fourteenth Amendment.

If the swearing of a jury is indispensible to its validity it follows that there must be some minimum requirements consistent with due process concerning:

(1) Whether the oath must be administered after jurors have been selected and impaneled in a particular case.

(2) Whether it is necessary to swear the prospective

jurors to answer questions touching on their competency to serve as jurors.

(3) Whether the oath should state that the juror meets all of the qualifications under state (or federal) law.

(4) Whether the defendant must be present at the administration of such oath or oaths.

It is conceded that a State has the right to prescribe procedural details in jury trials, including the administration of the jurors' oath, but it is contended that where there is a material departure from the minimum requirements in administering the oath, the defendant has had his essential rights of notice or opportunity to be heard by a competent tribunal interfered with in deprivation of due process within the meaning of the Fourteenth Amendment. *Frank v. Mangum*, 237 U. S. 309 (1914).

This writer has failed to find any case wherein this court has discussed the question of swearing the jury in either state or the U. S. Courts. Nor has there been found any guidance on the subject in the *Federal Rules of Criminal Procedure* or the rules of District Courts examined. The general index of *The U. S. Code Annotated* under "Oaths and Affirmations" has approximately 250 headings but no heading pertaining to a jury oath. The only federal case found which discusses the matter is *Walker v. United States*, 13 F (2d) 844, C. A. A. Tenn., Cert. den. 273 U. S. 726 (1926), wherein the Court in a dictum disapproved the Tennessee practice of swearing the jurors of the regular panel in a wholesale way at the opening of the term and not swearing them to specifically try a particular case after they are selected therefor. The present Tennessee statute provides that ". . . The court shall not swear any of the jurors until the whole number are selected for a jury." *Tenn. Code Ann. 40-2511.*

It is clear that at common law it was necessary to administer *two* oaths to a prospective juror: (1) the *voir dire* as to his qualifications to serve as a juror, and (2) to try the particular case before the court. The overwhelming weight of authority is that the jury must be sworn *after* they have been selected to try a particular case and that a general swearing at the commencement of the term is insufficient. 31 Am. Jur., *Jury,* Sec. 242 (1958); 50 C.J.S., *Juries* Sec. 294 (1947). *Howard v. Texas,* 80 Tex. Cr. 588, 192 S W 770, LRA 1917 D 391.

After a diligent search by this writer it appears that only Alabama, Mississippi and North Carolina deviate from the requirement that in a felony case (non-capital) a jury must be sworn after it is selected and impaneled to try a particular case.

It is contended on behalf of your petitioner herein that the failure to swear the *jurors* after they have been selected to try a particular case violates your petitioner's constitutional rights under the Fourteenth Amendment. At a general swearing of prospective jurors at the beginning of a term, they do not know the identity of the defendants nor the nature of the charges against such defendants. It is entirely possible that a prospective juror could take an oath as to one defendant but not as to another.

The reason for the necessity of swearing the jury for an individual case was well put by a court in the case of *Barney v. People,* 22 Ill. 160, (1859):

> "Although this practice may have prevailed in some states, at least in civil causes, it is opposed to the uniform practice in this state, and cannot meet with our approval. With some jurors and in some cases, too much solemnity cannot be observed in the conduct of a trial. The solemnity of calling the juror before the prisoner in the

> presence of the court and his there taking the solemn oath prescribed by the law, to well and truly try and true deliverance make of that prisoner, not only gives the prisoner a comfortable assurance that he is to have a fair and impartial trial, but has a salutary tendency to prepare the mind of the juror for the solemn duty he is assuming."

Referring to the practice of swearing all jurors at the beginning of the term, it is stated in *Slaughter v. State,* 100 Ga. 323, 28 S. E. 159 (1897):

> "This too much resembles the practice of the economical deacon who blessed the pork barrel instead of asking a blessing at each meal."

Your petitioner's case had not been called at the time that the general oath was administered to prospective jurors at the beginning o fthe term at which he was tried, and the record shows that it is not known whether he was even in the courtroom. His attorneys were not present.

Even if it is determined that the oath administered the prospective jurors was sufficient so as not to deprive your petitioner of due process of law under the Fourteenth Amendment, it is contended that your petitioner's absence at the time said oath was administered would deprive him of due process.

Consistent with a majority of the states, North Carolina has held that a defendant has a right to be physically present throughout the trial. "In every criminal prosecution it is the right of the accused to be present throughout the trial. In misdemeanors, this right can be waived by the defendant with the consent of the Court, through his counsel. In felonies other than capital, the right to be present can be waived only by the party himself." *State v.*

Matthews, 191 N. C. 378, 131 S. E. 743, (1926), and cases cited therein; *State v. Dry,* 152 N. C. 813, 67 S. E. 1000, (1910). This is likewise the rule in Federal Court, the impaneling of the jury being specifically mentioned as a stage of the proceedings. *Fed. R. Crim.* P. 43.

It could hardly be argued that the swearing of a jury is not a step in the progress of the trial. While several cases have held that it is not error to swear jurors as to their qualifications in the absence of the accused, the overwhelming weight of authority is to the effect that in criminal cases, the accused has a right to be present when the jury is sworn. See cases cited in 26 A. L. R. 2d, 785. It is obvious that when a panel of jurors is sworn on a Monday morning at the beginning of a term a number of defendants whose cases are docketed to be tried will not be in the courtroom, some being incarcerated, others consulting with their counsel or other parties in rooms adjacent to the courtroom, and still others not being required to be present until a later day in the week. These defendants not present in the court when the general oath is administered to the jurors have missed an integral step of *their* trial.

CONCLUSION

When a group of prospective jurors were sworn to try your petitioner's case before they were even selected as jurors to try said case, and without knowing the identity of your petitioner nor the nature of the charges or any of the circumstances of the case, and at a time when your petitioner and his attorneys were not physically present before the Court, and when such persons are not specifically sworn as to their qualifications to be jurors, nor to answer questions that may be put to them concerning their competency to be jurors, there has been such a departure from the solemn jurors' oath as was originally intended and used

as to render this procedure meaningless. A very real question exists as to whether your petitioner's rights under the due process clause of the Fourteenth Amendment have been violated as he contends.

The questions raised herein have been the subject of much litigation in the State Courts for more than a hundred years. The petition for a writ of certiorari should be granted to settle these questions of obvious importance in every felony trial in the United States.

The need for protecting the right to a proper trial by jury was well stated in the case of *State vs. Holt* 90 N. C. 749 (1894).

> "A greater danger arises from practices and precedents that insidiously gain a foothold and power in courts of justice by inadvertence and lack of due consideration. The great importance of trial by jury is sometimes lost sight of, even in courts of justice, in the disposition of petty misdemeanors, cases of no great moment, and what are called 'plain cases.' In the economy of time, the hurry of business, lack of attention, hasty consideration, irregular and unwarranted methods of trial are adopted, allowed, tolerated and thus vicious practices spring up, creating sources of danger to constitutional right.
>
> "It is the province and the duty of the courts to keep strict watch over and protect fundamental rights, in all matters that come before them. Those who administer the law should never forget that decided cases make precedents, precedents oftentimes of little moment in themselves, but which in their accumulated power may, in

some emergency, overturn principle and subvert the rights of many people."

Respectfully submitted,

Lawrence Egerton, Jr.
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Greensboro, North Carolina
Counsel for Petitioner

March 13, 1967

SUPREME COURT OF NORTH CAROLINA AT RALEIGH

STATE OF NORTH CAROLINA

versus

JAMES HENRY SMITH

APPEAL by defendant from *Carr, J.*, April 25, 1966 Criminal Session of HOKE.

Defendant, James Henry Smith, was indicted for the first-degree murder of Arthur Burroughs Rabon on December 28, 1965. When the case was called for trial, the solicitor announced that he would not seek a higher verdict than murder in the second degree.

Evidence for the State tended to show: The deceased (Rabon, Sr.) and defendant's father were first cousins. The deceased was an elderly man with white hair; defendant was 32 years old. Deceased's daughter, Helen, had been living in the home of defendant and his wife for the past two years. In January 1965, she had given birth to an illegitimate child, which — deceased thought — defendant had fathered. As a result, there was bad blood between defendant and the Rabon family. On the morning of the shooting, Robert Rabon, a son of deceased, had been convicted of assaulting defendant. The Rabon family had attended the trial. After it was over, decedent's son, Arthur Burroughs Rabon, Jr. (Rabon, Jr.), took Rabon, Sr., to his home on Highway No. 211 preparatory to a trip to Greensboro. While Rabon, Jr., sat in the car waiting for his father to come out, defendant passed by. Three of his

children, along with Helen Rabon and her child, were in the car with him. Rabon, Sr., emerged about that time and they "pulled out to Greensboro on Highway 211."

Rabon, Jr., overtook defendant's car and passed it at a speed of about 70 MPH. He then slowed down and defendant passed him. As defendant passed, he pointed a pistol at the occupants of the Rabon car. Rabon, Jr., made no further attempt to pass defendant. About 10 miles from the Rabon home, with his tires squealing, defendant drove off the highway into Wilson's Shell Service Station. He appeared to the occupants of the station to be frightened and he hollered, "Call the law," but no one called. Rabon, Jr., testified that he pulled in and stopped 4-5 feet behind defendant's vehicle so that his father could call the sheriff. Neither Rabon, Sr., nor his son was armed. When Rabon, Sr., got out of the automobile, defendant got out of his car, stood at the door, and started shooting. After the first shot, Rabon, Sr., grabbed his arms and defendant shot again. Deceased had not moved from the spot at which he was shot the first time.

When deceased fell, Rabon, Jr., opened the door of his car and started to get out. Defendant said, "Burroughs, if you get out, I will shoot you too." Seeing the pistol in defendant's hand, Rabon, Jr., "ducked back in the seat." Defendant fired, and the bullet made a hole in the windshield over the steering wheel. Rabon, Jr., "peeped out" and defendant told him to get out where he could see him; that he wanted to kill him too. Defendant added, "You didn't think I was going to do it." Rabon, Jr., still crouched, backed his car out into the street where he sat until the officers arrived approximately 20 minutes later. During that time he watched defendant drink a soft drink. Immediately after the shooting, defendant said to a bystander, "I'll swan, I sure hated to kill that old man but he would have killed me." Several months earlier, defendant, referring to

deceased, had said that "he would get the white-headed rascal sooner or later."

Defendant's evidence tended to show: On the morning of the shooting, defendant had requested the Chief of Police of Raeford to protect him from the Rabons. Because he was afraid to go alone, he had asked the Chief to accompany him to the courthouse where he was to appear as a witness against Robert Rabon, whom he had charged with assault. The Chief stayed near him until after the trial when he "told him to pick up his children and get out of town." Defendant was following this advice when the Rabon car came up behind him on Highway No. 211 at a high rate of speed. Defendant slowed down in the hope that the Rabons would pass him. They slowed down too, however, and followed him so closely that the two cars were traveling bumper to bumper. Defendant then tried to outrun the Rabon automobile, but they pursued him at a speed of 85-90 MPH. Once, when the Rabon car came alongside defendant's automobile, Rabon, Sr., pointed his finger at defendant and said, "Boy, I am going to get you yet." In July or August Rabon, Sr., had threatened defendant's life, saying, *inter alia,* that he was a better man than defendant and that he settled his disputes rather than let the law settle them for him.

Defendant denied that he ever drew a pistol on the Rabons until he went into the service station. He testified that when they came in, Rabon, Sr., opened the car door on his side and said, "You've had it." At the same time, Rabon, Jr., was attempting to get out of the automobile on his side. Defendant hollered for help and for someone to get the law. When nobody answered, he thought the service station was deserted. He told Rabon, Sr., to go on and leave him alone. Instead of doing so, however, he came on him and defendant shot him because, he said, Rabon, Sr., would have killed him had he not done so. He then shot at

Rabon, Jr., to keep him from jumping out of the car and attacking him. He never saw any weapon of any kind in the hands of either Rabon, Jr., or Rabon, Sr., on that day. On an earlier occasion, however, he had seen Rabon, Jr., with a pistol. After the shooting, defendant stayed at the station, with his pistol in his hand, until the officers arrived. When he drank a soft drink, he continued to hold the pistol in his hand.

A maid, Lula Bell Purcell, who worked at the house across the street from the Wilson Service Station, was cleaning some rugs on the front porch when defendant's automobile and the Rabon vehicle came into the service station. She testified that the Rabon car "was chasing" defendant's car; that the man in the rear car had a pistol; and that he was shooting when the two cars drove up. She went into the house and locked the door. No other witness put a weapon in the possession of the Rabons.

The jury returned a verdict of guilty of murder in the second degree. From a judgment that defendant be confined in the State's prison for not less than twelve nor more than fifteen years, defendant appeals.

T. W. Bruton, Attorney General; Andrew A. Vanore, Jr., Staff Attorney for the State.

Egerton, Alspaugh & Rivenbark by Lawrence Egerton, Jr., and W. Douglas Albright for defendant.

SHARP, J. Both the State's and defendant's evidence tended to show that deceased died from a wound which defendant intentionally inflicted with a pistol. Defendant's motions for nonsuit were, therefore, properly denied. *State v. Redfern,* 246 N. C. 293, 98 S. E. 2d 322; *State v. Gordon,* 241 N. C. 356, 85 S. E. 2d 322; 2 Strong, N. C. Index, Homicide § 20 (1959). The credibility and sufficiency of defendant's evidence to establish his plea of self-defense were for the jury to evaluate in the light of the

court's instructions. The judge's charge embraced all the applicable principles of law relating to self-defense, *State v. Marshall,* 208 N. C. 127, 179 S. E. 427, and it fairly presented all of appellant's contentions. Defendant was unable to satisfy the jurors, who heard him and his witness testify and observed their demeanor, that the homicide was excusable. Under the evidence, the jury might well have returned a different verdict. Defendant's guilt or innocence, however, could only be determined by the twelve, and their verdict must stand unless some error of law appears in the trial.

In a last-ditch effort to escape the verdict, defendant now contends — for the first time — that it is invalid because the jurors were not sworn to try this particular case after they had been selected and impaneled for it. At the beginning of the term, however, the Clerk of the Superior Court had administered to the individual jurors who tried this case, and to all others who had been summoned as jurors for that week of the Session, the following oath which G. S. 11-11 prescribes for the "jury, in criminal actions not capital":

> "You and each of you swear (or affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you God. (The same oath to talismen by using the word 'day' instead of 'term'.)".

For the "jury, in a capital case," G. S. 11-11 prescribes a specific oath which must be administered to each juror before he is seated on the panel to try the case. Defendant here was indicted for a capital crime, but when the solicitor announced to the court as the case was called for trial that the State would not seek a verdict of murder in the first degree, the case became a "criminal action not capital." It

was after this announcement that defendant entered his plea and the jury was selected.

Defendant correctly asserts that under the common law it was essential "that the jury be duly sworn to try *the cause.*" 31 Am. Jur., Jury § 242 (1958). (Emphasis added.) See also 50 C. J. S., Juries § 294 (1947). Where, however, the statute so provides, a general oath may be administered to jurors at the opening of a court for the trial of issues and it is not necessary that they should be sworn in each cause in which they are called. *The People, on the relation of Wands, vs. Albany C. P.*, 6 Wend. (N. Y.) 548; 31 Am. Jur., Jury § 242, *supra.*

In North Carolina, the common-law requirement that jurors be sworn to try the cause was changed with reference to civil cases "At a General Assembly, begun and held at Fayetteville on the First Day of November, in the Year of our Lord, One Thousand Seven Hundred and Ninety, and in the Fifteenth Year of the Independence of the said State: Being the First Session of the said Assembly." Preamble to the Laws of North Carolina (1790). Chapter IX of these Laws provided:

> "WHEREAS the present method practised in the courts of law in this state of swearing the petit jury in every cause, in some measure retards the business in said Courts, and such frequent use of oaths in a great measure destroys their solemnity:
>
> "I. *Be it therefore enacted by the General Assembly of the State of* North Carolina, *and it is hereby enacted by the authority of the same,* That from and after the first day of June next, the clerks of the respective courts of law, shall at the beginning of their courts, swear or cause to affirm such of the petit jury as are of the original pannel, well and truly to try all civil causes that shall come before them according to

the evidence given thereon, and if there should not be enough of the original pannel, talismen shall take a similar oath or affirmation to try such causes as shall come before them during the day. *Provided always* . . . that nothing herein contained shall be construed to alter the present method of swearing petit jurors on state trials, but the same shall continue in the usual form as heretofore practised."

In Taylor's Revisal of 1827, Chapter 1133, it was enacted,

"That in the trial of all pleas and prosecutions for offences not capital, unless in cases where the courts may otherwise direct, petit jurors, as well (as) talismen, as those of the original pannel, shall be sworn or affirmed, (as the case may be,) well and truly to try all issues of traverse, that shall come before them *during the day*." (Italics ours.)

Thus, instead of swearing jurors in *every criminal case,* in 1827 they were sworn only *once a day*. In the Revised Code of North Carolina, enacted by the General Assembly of 1854, Chapter 76 (30), we find the same oath provided for "criminal cases not capital" which is now incorporated in G. S. 11-11. Thus, in 1854, the "method of swearing petit jurors on State trials" other than capital (which the General Assembly of 1790 had refused to alter when it changed the method of swearing jurors in civil actions) became the same as that prescribed in civil trials. Since 1827 the statute — not the common law — has governed the procedure in cases such as this.

The method employed by the Clerk of the Superior Court in swearing the jurors who tried this case has had the sanction of the law for more than one hundred years. We have known of no other procedure in our lifetime.

In the trial below, we find

No error.

LIBRARY
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1968

No. 1142

JAMES HENRY SMITH,

Petitioner

vs.

STATE OF NORTH CAROLINA,

Respondent.

Brief of Respondent State of North Carolina in Opposition to Petition For Writ of Certiorari

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JAMES HENRY SMITH,

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STATE OF NORTH CAROLINA,

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Brief of Respondent State of North Carolina In Opposition to Petition For Writ of Certiorari.

OPINION BELOW

The Opinion of the Supreme Court of North Carolina is reported in 268 N. C. 659, 151 S.E. 2d 596,

JURISDICTION

The Judgment of the Supreme Court of North Carolina was entered on December 14, 1966. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1257 (3).

QUESTION PRESENTED

WAS THE PETITIONER DEPRIVED OF ANY CONSTITUTIONAL RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT UNDER THE CIRCUMSTANCES OF THIS CASE?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is:

Fourteenth Amendment to the United States Constitution "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On Monday, April 25, 1966, at 10:00 A. M. in the Courthouse in the City of Raeford, North Carolina, Hoke County Superior Court was opened for trial of criminal cases, his Honor, Leo Carr, presiding. All persons summoned to attend this term as jurors were asked to stand, Bibles were distributed to them, and each juror summoned for the trial placed his or her left hand on the Holy Bible, and raised his or her hand upward, whereupon the Clerk of the Hoke County Superior Court then administered the following oath: "You and each of you swear that you will well and truly try all issues in criminal actions which shall come before you during this term and true verdicts give according to the evidence thereon; so help you, God" R. p. 5.

The Petitioner was charged with first degree murder. R. p. 4. On the call of the case, the Solicitor announced that the State would not seek a higher verdict than murder in the second degree or manslaughter as the facts might warrant. R. p. 4.

Counsel for the Petitioner and the Petitioner thereupon examined each of the respective jurors that had been summoned for the term and had been sworn in as a body and selected the jury that heard the Petitioner's case. R. p. 6. No question was raised at this time, or at any time through-

at the trial, concerning the selection or swearing of the jury.

After the Petitioner and State had passed upon a satisfactory jury, and one alternate, the Clerk of the Superior Court made the following statement:

> "Members of the jury, you have been sworn and are now impaneled to try this action wherein the State of North Carolina is the plaintiff and James Henry Smith is the defendant; sit together, hear the evidence, and render your verdict accordingly."

The Petitioner was tried and the jury subsequently returned a verdict of "guilty of murder in the second degree." R. pp. 125-129. Thereupon, the Petitioner took exception to the Judgment of the trial court and gave Notice of Appeal to the Supreme Court of North Carolina.

ARGUMENT

THE PETITIONER WAS FOUND GUILTY BY A JURY DULY IMPANELED AND SWORN AS PROVIDED FOR BY LAW IN THE STATE OF NORTH CAROLINA AND IN SUCH A MANNER THAT NONE OF HIS CONSTITUTIONAL RIGHTS WERE DENIED.

The following appears at pages 5 and 6 of the Record:

> "On Monday, April 25, 1966, at 10:00 A. M. in the Courthouse in the City of Raeford, North Carolina, Hoke County Superior Court was opened for trial of criminal cases, his Honor, Leo Carr, presiding and holding said Court according to law. All persons summoned to attend said term as jurors were asked to stand, and Bibles were distributed to them, and each juror summoned for the term placed his or her left hand on the Holy Bible, and raised his or her hand upward; whereupon the Clerk of Hoke County Superior Court then administered the following oath: 'You and each

of you swear that you will well and truly try all issues in criminal actions which shall come before you during this term and true verdicts give according to the evidence thereon; so help you, God.' It is not known whether the defendant was physically present in the courtroom at the time the aforementioned oath was administered. The attorneys for the defendant were not present. Thereupon the Solicitor duly began to call the docket of cases set for trial at the April 25, 1966, Criminal Term of Hoke County Superior Court.

"On Tuesday, April 26, at approximately 10:00 A. M., the Solicitor for the Ninth Solicitorial District, the Honorable Lester G. Carter, Jr., called the defendant's case for trial upon a Bill of Indictment charging the defendant with murder in the first degree. Upon the call of the case for trial, the Solicitor announced in open court that the State would not seek a higher verdict than murder in the second degree or manslaughter as the facts might warrant. The defendant, James Henry Smith, by and through his counsel, tendered a plea of not guilty to those charges embraced within the Bill of Indictment.

"The Court found that the trial of this case was likely to be protracted and directed that an alternate juror be selected and required to serve in the manner provided by law.

XXX

"A duly summoned jury was selected. After the State and Defendant had announced satisfaction with the jury panel, the Clerk of Hoke County Superior Court stood and made the following statement: 'Members of the jury, you have been sworn and are now impaneled to try this action wherein the State of North Carolina is the plaintiff and James Henry Smith is the defendant; sit together, hear the evidence, and render your verdict accordingly.' "

Neither the Record nor the Petitioner's Brief recites that

the Petitioner did not realize, as is the universal practice in North Carolina in non-capital criminal cases, that the jury had not been resworn after having been impaneled. Obviously, Petitioner, his counsel, or both, realized this fact since their memory as to what actually happened is so vivid. The Petitioner did not raise this question in the trial below, but did so for the first time on appeal to the Supreme Court of North Carolina.

Many other jurisdictions are quoted from as disapproving the "single swearing" of the jury. However, we must remember that involved here is a North Carolina practice of long standing which, if overturned, would cause a flooding of petitions in the courts of this State from individuals convicted of non-capital criminal offenses by jurors which were sworn initially at the beginning of the term and not again resworn after impaneling. In all non-capital criminal actions, the jurors in North Carolina are sworn only once, at the beginning of the term, unless, of course, additional jurors are required in the event the initial panel is exhausted. However, this is not the case here since the jury that tried the Petitioner's cause was selected from the original panel sworn as a body on Monday, April 25, 1966. Moreover, it should be re-emphasized that, though the defendant was indicted for a capital crime, the Solicitor announced to the trial court that the State would not seek a higher verdict than murder in the second degree or manslaughter as the facts might warrant. Both murder in the second degree and manslaughter are non-capital felonies. N. C. G. S. 14-17; 14-18. Then, and only then, by and through his counsel, did the Petitioner enter his plea.

N. C. G. S. 11-11 prescribes among other oaths, the oath necessary for jurors in all non-capital criminal actions.

> "Jury, in Criminal Actions Not Capital.—You and each of you swear (or (affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you, God."

The Petitioner has correctly asserted that under the common law it was essential "that the jury be duly sworn to try *the cause*". 31 Am. Jur. Jury, Sec. 242 (1958). (*Emphasis added*) See also, 50 C.J.S., Juries, Sec. 294 (1947). However, where the statute so provides, as is the procedure in North Carolina, G. S. 11-11, *supra,* a general oath may be administered to jurors at the opening of a court for the trial of issues and it is not mandatory that the jurors again be sworn in each cause in which they are called. THE PEOPLE, ON THE RELATION OF WANDS, v. ALBANY, C. P., 6 Wend. (N.Y.) 548; 31 Am. Jur., Jury, Sec. 242, *supra.*

The history of North Carolina G. S. 11-11 is discussed in detail by the Court, through Sharp, J., in STATE v. SMITH, 268 N. C. 659, 151 S.E. 2d 596 (1966), 268 N.C. 663,664, and we quote:

> "In North Carolina, the common-law requirement that jurors be sworn to try the cause was changed with reference to civil cases 'At a General Assembly, begun and held at Fayetteville on the First Day of November, in the Year of our Lord, One Thousand Seven Hundred and Ninety, and in the Fifteenth Year of the Independence of the said State: Being the First Session of the said Assembly.' Preamble to the Laws of North Carolina (1790). Chapter IX of these Laws provided:
>
> "WHEREAS the present method practised in the courts of law in this state of swearing the petit jury in every cause, in some measure regards the business in said Courts, and such frequent use of oaths in a great measure destroys their solemnity:
>
> "I. *Be it therefore enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same,* that from and after the first day of June next, the clerks of the respective courts of law, shall at the beginning of their courts, swear or cause to affirm such of the petit jury as are of the

original pannel, well and truly to try all civil causes that shall come before them according to the evidence given thereon, and if there should not be enough of the original pannel, talismen shall take a similar oath or affirmation to try such causes as shall come before them during the day. Provided always . . . that nothing herein contained shall be construed to alter the present method of swearing petit jurors on state trials, but the same shall continue in the usual form as heretofore practised.'

"In Taylor's Revisal of 1827, Chapter 1133, it was enacted,

'That in the trial of all pleas and prosecutions for offences not capital, unless in cases where the courts may otherwise direct, petit jurors, as well (as) talismen, as those of the original pannel, shall be sworn or affirmed, (as the case may be,) well and truly to try all issues of traverse, that shall come before them *during the day*.' (Italics ours.)

"Thus, instead of swearing jurors in every criminal case, in 1827 they were sworn only once a day. In the Revised Code of North Carolina, enacted by the General Assembly of 1854, Chapter 76 (30), we find the same oath provided for 'criminal cases not capital' which is now incorporated in G. S. 11-11. Thus, in 1854, the 'method of swearing petit jurors on State trials' other than capital (which the General Assembly of 1790 had refused to alter when it changed the method of swearing jurors in civil actions) became the same as that prescribed in civil trials. Since 1827 the statue—not the common law—has governed the procedure in cases such as this."

The State recognizes the fact that a conviction by an unsworn jury is a nullity and may be raised at any point during the proceedings of the case. However, this case is distinguishable in that all persons summoned at the April 25,

1966 Criminal Term of the Hoke County Superior Court to serve as jurors were in fact sworn. After the State and the Petitioner had announced their satisfaction with the jury panel, the Clerk stood and made the following statement: "Members of the jury, you have been sworn and are now impaneled to try this action within the State of North Carolina as the plaintiff and James Henry Smith as the defendant; sit together, hear the evidence, and render your verdict accordingly."

There can be no doubt that the solumn duty that the jury was to perform in this particular case was re-emphasized.

Petitioner further contends that his attorneys were not present in the courtroom, and the record does not disclose whether the Petitioner was present or not, at the time the general oath was administred to the prospective jurors at the beginning of the term of court. Petitioner concludes that his absence, if he were absent, deprived him of due process of law.

Regardless of Petitioner's presence at the time the general oath was administered, it was from this sworn panel that the Petitioner selected the twelve jurors, and one alternate, that tried his case. The Petitioner does not here contend that he, or his counsel, were denied an opportunity of selecting from the original sworn panel of jurors the twelve that heard and decided his case. He was obviously satisfied with the jury selected at the time of trial because no question was raised at any time during the procedings at the trial level.

Therefore, if the Petitioner were absent at the time the general oath was administered to the prospective jurors, we do not believe that any of his substantial rights were affected. Petitioner has not shown he was prejudiced in any way. STATE v. ARNOLD, 258 N. C. 563, 129 S.E. 2d 229 (1962), reversed on other grounds, 276 U.S. 773 (1964); 23 C.J.S. Criminal Law, Sec. 974, p. 890 and note 70 (1961).

As Petitioner has pointed out in his Brief, the Supreme

Court of North Carolina has said that in every criminal prosecution it is the right of the accused to be present throughout the trial. STATE v. MATTHEWS, 191 N. C. 278, 131 S.E. 743 (1926); STATE v. DRY, 152 N.C. 813, 67 S.E. 1000 (1900). However, the Supreme Court of North Carolina has interpreted this to mean that the accused has a right to be present at every stage of the trial when his substantial rights may be affected by the proceeding against him. STATE v. ARNOLD, *supra*. Here, Petitioner's absence, and the absence of his counsel, at the time the general oath was administered could not have "affected any of his susbtantial rights". He was not on trial at the time. The Petitioner's case was called for trial the day after the general oath was administered to the prospective jurors. When his case was called for trial, and Petitioner does not contend otherwise, he and his counsel were present throughout the entire proceeding.

CONCLUSION

The Petitioner was tried by a sworn jury. None of his constitutional rights were denied because the jury which tried his cause was sworn at the beginning of the April 26, 1966 term of the Superior Court of Hoke County and not again immediately preceding the trial of Petitioner's case.

Respectfully submitted,

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